No. 102 Misc.

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

DENNIS MANAFORD WHITNEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

I

Petitioner requests this Court to issue a Writ of Certiorari to the Florida District Court of Appeal, Third District, to review its decision rendered April 5, 1966, in Whitney v. State, 184 So.2d 207, certiorari denied by the Florida Supreme Court without opinion on September 9, 1966, case number 35,345.

This petition is timely filed under the rule announced in American Railway Express Company v. Levee, 263 U.S. 19, that the computation of time from a decision of an intermediate state appellate court begins to run when the highest state court declines to exercise jurisdiction. Jurisdiction is conferred upon this Court by 28 U.S.C.A., Section 1257.

II

QUESTIONS OF LAW

A. Is it a denial of due process for the state to deny a post-conviction evidentiary hearing in a capital case where the petitioner has alleged that extensive pre-trial publicity, involving extra-judicial confessions together with [illegible] judicial pre-trial publicity deprived him of a fair trial, [illegible] the question of whether the jury would recommend mercy?

B. Is it a denial of due process for the state to deny a post-conviction evidentiary hearing under the circumstances related above when the petitioner has alleged that he requested his court-appointed counsel to seek a change of venue but they refused to do so?

III

STATEMENT OF FACTS

Petitioner, at 17 years of age (Trial R.23) and indigent (Trial R.3), was arrested on March 5, 1960 (Trial R.40) in connection with the investigation of six homicides committed in Florida and Arizona (Trial R.31; habeas corpus Trans. 8, 82), without being advised or otherwise knowing of his right to remain silent or his right to consult an attorney (Rule I R.1) and without opportunity to discuss the problem with his family (Trial R.30), he confessed to these crimes the next day at an interview arranged by the Dade County Sheriff, attended by the press, wherein his confessions to the six homicides were videotaped (habeas corpus Trans. 84, 88, 127) and extensively published by local commercial television stations and radio broadcasting stations (Trial R.258, 287, 300, 303) prior to his trial in June. There were also extensive newspaper reports of his confessions (Trial R. 300, 303, 334, 335, 404). Counsel were appointed to represent petitioner (Trial R.4) and were asked by petitioner to move for a change of venue, but they did not so. (Rule I R.3).

The murder trial was limited to a written stipulation of facts constituting murder in the first degree of the person in question (Trial R.162), signed by the petitioner on the advice of his counsel (habeas corpus Trans. 130, 161). [illegible] the stipulation was equivalent to a plea of guilty (habeas Trans. 131), a recording of an extra-judicial [illegible] the murder in question played to the jury (Trial R.[illegible]) in a press who established venue, petitioner testified [illegible] his adult environment. The jury returned a verdict [illegible] recommendation of mercy [illegible]

IV

HISTORY OF THE CASE

Petitioner instituted a post-conviction collateral attack as provided for in Florida Criminal Procedure Rule [illegible] (identical with 28,U.S.C.A.2255) alleging inter alia (Rule [illegible] 1,2):

> 3) Petitioner's arrest, detention, pre-trial proceedings, and trial, received widespread adverse publicity by newspapers, radio and television, including broadcasts and telecasts of taperecorded confessions made by the Petitioner to law enforcement agencies, to such an extent that such publicity prevented the selection of a fair and impartial jury on the question of whether the jury might recommend mercy for Petitioner in their verdict.
> * * *
>
> 6) Trial counsel for the Petitioner, without authority from the Petitioner, or other justification a) Refused to ask the Court for a change of venue though requested to do so by the Petitioner.
> * * *
>
> 7) The constitutional rights which were waived by Petitioner's counsel through error of omission and commission constitute a denial of due process and right to counsel, but do not constitute an intentional relinquishment or abandonment of such rights or privileges by your Petitioner, because at the time of trial he did not understand and know what protections were offered him by the Federal and State Constitutions.

The trial judge, after ordering the State to respond [illegible] (Rule 1 K-11), denied relief without a hearing (Rule 1 K-11) on the grounds contended by the State in its answer (Rule [illegible]) that the Appeal of the original conviction, Whitney v. State, 137 So.2d 529 (Fla. 1961), and an earlier habeas corpus petition alleging grounds no longer relied upon, Whitney v. Cochran, 193 So.2d 727 (Fla.1963), cert. denied 375 U.S. 908, were res judicata as to the issues raised. The Florida District Court of Appeal disagreed as to the applicability of the [illegible] but affirmed the trial court on the grounds [illegible]

as to the first reason, lack of due process of law because of excessive publicity, see: Simpson v. State, Fla.App.1964, 165 So.2d 195; Sheppard v.Maxwell, 6th Cir. 1965, 346 F.2d 707. No motion for change of venue was made, nor were the peremptory challenges exhausted in the case sub judice. Therefore, the cases relied upon by the appellant (see: Irving v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751; Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663) are not applicable.

The petition for certiorari which was filed in the Florida Supreme Court (Rule I R.61) was denied without opinion (Rule I R.60).

V

RECORD ON APPEAL

The following record, portions of which cannot be certified without payment of costs by petitioner, accompany and are filed with this petition:

A. Certified record in Rule I proceeding

1) Criminal Rule I petition

2) Trial court order requiring state to reply

3) Reply to Rule I petition by the state

4) Trial court order denying relief

5) Assignments of error relied upon in the Florida District Court of Appeal

6) Opinion of Florida District Court of Appeal, reported at 184 So.2d [illegible]

7) Petition for writ of certiorari to Florida Supreme Court

8) Memorandum Opinion of Florida Supreme Court, case number 35,345

B. Transcript of testimony taken in habeas corpus proceeding before Commissioner Warren in Whitney v. Cochran, reported at 132 So.2d 787

C. Original trial transcript in three volumes

[1] Reversed 384 U.S. 313

VI

ARGUMENT

Rideau v. Louisiana, 373 U.S. 723, as construed in Estes v. Texas, 381 U.S. 532, holds that pre-trial publication by television stations of motion pictures showing the defendant in the act of confessing to a murder is inherently invalid under the Due Process Clause of the Fourteenth Amendment. Errors of this magnitude cannot be cured by trial counsel's failure to request a change of venue[2] and may be brought to the court's attention at any time. The petitioner is entitled to an evidentiary hearing to prove the telecasting of his extra-judicial confessions and to otherwise show that prejudicial pre-trial publicity deprived him of a fair trial on the question of whether the jury would recommend mercy.

WHEREFORE petitioner prays this writ be granted and the case transferred to the appellate docket.

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[2] See Brookhart v. Janis, 384 U.S. 1 and Henry v. Mississippi, 379 U.S. 443, both holding that counsel without prior consultation with his client in situations less critical than presented here could not waive his client's constitutional rights.